In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-800

Charles E. Allen
and
John W. Horn, et al,
Petitioners,

vs.

Columbus Coated Fabrics,
a Division of Borden Chemical Co.;
Eastman Kodak Company, et al.
Respondents.

PETITION FOR WRIT OF CERTIORARI

ROBERT LEACH
VORYS, SATER, SEYMOUR
& PEASE
52 E. Gay St.
Columbus, Ohio 43215

PHILIP R. BRADLEY
BRADLEY & FARRIS
1260 E. Broad St.
Columbus, Ohio 43203
Attorneys for Petitioners

EARL F. MORRIS
WRIGHT, HARLOR, MORRIS & ARNOLD
37 W. BROAD ST.
COLUMBUS, OHIO 43215
Attorneys for Respondents

RONALD CULP, P.O. BOX 26, WORTHINGTON, OHIO 43085 (614) 846-7025

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(a) an employer and his agents are totally immune from suit for damages caused by their negligent or intentional acts;

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Columbus Coated Fabrics,
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Eastman Kodak Company, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The Petitioners, Charles E. Allen, John W. Horn, and 68 other employees of the respondents, and their respective spouses, pray for a writ of certiorari to review the orders of the Supreme Court of Ohio of September 10, 1976, overruling their motion to certify the record and dismissing, *sua sponte*, petitioners' appeals of right from separate judgments entered on February 3, 1976, and May 25, 1976, by the Court of Appeals for Franklin County, Ohio, affirming the judgment of the Court of Common Pleas of Franklin County, Ohio.

OPINION BELOW

The Supreme Court of Ohio rendered no opinion. The Court of Appeals of Franklin County rendered a written decision on February 3, 1976 (Appendix A-1, *infra*, p.16), applying to 64 of the petitioners, and adopted the same decision on May 25, 1976, applying to 6 of the petitioners. Neither decision was reported.

JURISDICTION

The orders of the Supreme Court of Ohio, entered on September 10, 1976, overruling petitioners' motion for orders directing the Court of Appeals of Franklin County, Ohio, to certify its records (Appendix B-1, B-2) and dismissing, *sua sponte*, the appeals of right (Appendix C-1, C-2) are attached hereto. The jurisdiction of this Court is invoked under Rule 19 of this Court and 28 U.S.C. 1257 (3), which provides for a review of final judgments rendered by the highest Court of a State by writ of certiorari, where the petitioners have been denied due process of law and equal protection under Amendments Five and Fourteen of the United States Constitution.

QUESTIONS PRESENTED

1. Are employees who are covered by the Ohio Workmen's Compensation laws (Ohio Constitution, Article II, Section 35; Ohio Revised Code, Section 4123.74; Ohio Revised Code, Section 4123.741) deprived of their right to life and liberty without due process of law, contrary to the Fifth and Fourteenth Amendments to the United States Constitution, where, as a result of these Ohio statutes—

(a) an employer and his agents are totally immune from suit for damages caused by their negligent or intentional acts;

(b) the legislative scheme encourages employers to maintain their work place in an unsafe condition, dangerous to the health and welfare of their employees.

2. Are employees who are covered by the Ohio Workmen's Compensation laws (Ohio Constitution, Article II, Section 35; Ohio Revised Code, Section 4123.74; Ohio Revised Code, Section 4123.741) deprived of their right to equal protection contrary to the Fourteenth Amendment to

the United States Constitution, where the Ohio legislative scheme arbitrarily maintains a class of injured persons who have no right to sue their employer and his agents for negligence or intentional acts?

3. Are employees who are covered by the Ohio Workmen's Compensation laws (Ohio Constitution, Article II, Section 35; Ohio Revised Code, Section 4123.74; Ohio Revised Code Section 4123.741) deprived of their right to property without due process of law, contrary to the Fourteenth Amendment to the United States Constitution, where, as a result of these Ohio statutes—

(a) an employer and his agents are totally immune from suit for damages caused by their negligent or intentional acts;

(b) the compensation scheme is specifically designed to reimburse an injured employee for only a fraction of his actual damages.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of pertinent constitutional and statutory provisions applicable herein is contained in Appendix D, *infra*, p. 35. These relevant provisions are:

Fifth Amendment to Constitution of the United States;
Fourteenth Amendment to Constitution of the United States;
Ohio Constitution, Article II, Section 35;
Ohio Revised Code: Sections 4101.11, 4101.12, 4123.01, 4123.54, 4123.74 and 4123.741.

STATEMENT OF TI CASE

In September and October, 1973, an outbreak of toxic chemical poisoning was identified at the Columbus Coated Fabrics manufacturing plant in Columbus, Ohio. In all, over 100 employees out of a work force of approximately 1,160 were afflicted with a nerve disorder of long-term, insidious onset and sometimes crippling consequences. Of those afflicted, many have subsequently become permanently and totally disabled. The magnitude of the problem was discovered through a physical testing program on all plant employees, conducted by the Ohio Department of Health after local physicians noted an abnormally high concentration of nerve disease complaints among the plant workers.

Written complaints of the unsafe working conditions in the plant had been filed with the federal Occupational Safety and Health Administration by plant employees as early as April, 1973. Occupational Safety and Health Administration investigators inspected the plant and found the facility to be below federal safety standards. Of air samples taken during the spring and early summer of 1973, over one-half contained concentrations of known, toxic chemical fumes well in excess of safe working standards published by both the Ohio Department of Health and the Occupational Safety and Health Administration. In May, 1973, the Occupational Safety and Health Administration notified Columbus Coated Fabrics management of proposed penalties for failure to maintain a safe work place. In August, 1973, Columbus Coated Fabrics was cited and fined by the Occupational Safety and Health Administration for failing to comply with safety regulations and orders. In September, 1973, follow-up air samples were taken. At this time, near lethal concentrations of known, toxic chemical fumes were discovered in working areas.

During 1973, until October, 1973, the Columbus Coated Fabrics management continued to operate the plant, having knowledge that their employees were being exposed daily to toxic and almost lethal concentrations of chemical fumes. In the continued operation of the plant, the Columbus Coated Fabrics management knowingly violated specific State safety regulations and safe work place laws. The management continued to use manufacturing practices which it knew to be dangerous, yet which resulted in a higher production rate. The management, in conjunction with the plant physician, suppressed the results of the various federal investigations and, at the same time, refused to provide employees with the most rudimentary safety equipment or modify the work place, as required by the federal orders and State safety regulations. The operation of the plant continued until the employees were made aware of the situation through the Department of Health examinations and walked out on strike.

Petitioners sued Columbus Coated Fabrics, Columbus Coated Fabrics' officers, and the plant physician, alleging their injuries resulted from willful and intentional acts on the respondents' parts. Petitioners also sued the manufacturers and distributors of the toxic chemicals involved; therefore, the caption of the case is *Charles E. Allen, et al. vs. Eastman Kodak Co., et al.* Petitioners' actions with respect to Columbus Coated Fabrics; Borden's, Inc.; Edward L. Mahoney; Dewey Bennett; and Dr. William T. Paul (the respondents in the case at bar) were dismissed in the Court of Common Pleas of Franklin County, Ohio pursuant to the respondents' motion for summary judgment, on the basis of Ohio Constitution, Article II, Section 35; and Revised Code Sections 4123.74 and 4123.741. Petitioners appealed to the

Court of Appeals of Franklin County, Ohio. The Court of Appeals of Franklin County, Ohio affirmed the judgment of the trial court. As noted previously, the Supreme Court of Ohio overruled the petitioners' motions to certify and dismissed, *sua sponte*, the petitioners' appeal of right.

HOW FEDERAL QUESTIONS PRESENTED

The constitutional questions herein involved were first put in issue in the petitioners' memoranda contra respondents' motion for summary judgments in the Franklin County Common Pleas Court. A more extensive argument was made in the Franklin County Court of Appeals on the same constitutional issues. They were stated again in the petitioners' memoranda in support of jurisdiction in the Supreme Court of Ohio, Case No.'s 76-361 and 76-759.

REASONS FOR GRANTING THE WRIT AS TO QUESTION 1

The petitioners herein worked in a dangerous environment solely because their employers intentionally failed to warn them of dangers known only to themselves, and further intentionally failed to alleviate the known, unsafe conditions existing at the Columbus Coated Fabrics plant. A prime motivating factor in the continuation of respondents' intentional conduct was no doubt the fact that these respondents could rely on Sections 4123.74 and 4123.741 of the Ohio Revised Code to avoid any liabilities for injuries resulting from their intentional acts, other than Workmen's Compensation payments. Since, in Ohio, an employee's right to recover for injuries sustained in the work place is limited to Workmen's Compensation payments, the respondents were able to calculate, with certainty, the limited economic cost of

being required to pay Workmen's Compensation awards arising out of their failures to test, warn, or otherwise protect employees from toxic chemical hazards. By then comparing such costs with lost profits from interrupting production, setting up effective safety programs, or warning their employees, respondents were able to deliberately continue operating when it was profitable for them to do so. It is naive to assume that other employers in Ohio do not make such economic analyses and comparisons when considering the cost of introducing untested, toxic chemicals into their work places.

It has long been held by this Court that the Fifth and Fourteenth Amendments of the United States Constitution protect an array of activities, which our society has commonly recognized as being free from undue governmental control, regulation and influence. At common law, since the earliest days of the Industrial Revolution, our society has recognized an employee's right to be reasonably safe in his place and method of employment. In Ohio, this is a statutory right, as indicated by Ohio Revised Code, Sections 4101.11 and 4101.12. Any state legislation that has the effect of depriving persons of this fundamental liberty must be justified by more than a mere showing of legitimate state interest. Such a legislative scheme cannot paint with a broad brush to blot out personal liberties in accomplishing the purpose of the legislation, but must precisely accomplish the purpose for which it was enacted. This concept was ably stated by this Court in *Kusper vs. Pontikas*, 414 U.S. 51, 38 Lawyer's Edition 2d 260, 94 Supreme Court 303 (1973), 58 and 59:

> . . . "For even when pursuing a legitimate state interest, a state may not choose means that unnecessarily restrict constitutionally protected liberty, *Dunn vs. Blumstein*, 405 U.S. 330 at p. 343 (1971).

> 'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' *NAACP vs. Button,* 371 U.S. 415 at p. 438 (1962). If the state has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties. *Shelton vs. Tucker,* 364 U.S. 479 at p. 488 (1960)."

The Ohio statutes at issue give employers a license to knowingly injure their employees with a minimum of risk. They encourage employers to ignore safety standards in a modern industrial environment wherein the worker has already become the human "guinea pig" for thousands of newly developed and untested toxic chemicals, which are being introduced into the work place each year without governmental regulation or supervision of any meaningful kind. Although the Ohio legislature may have originally addressed some legitimate social interest in enacting Article II, Section 35, Ohio Constitution, and Sections 4123.74 and 4123.741, Ohio Revised Code, any redeeming social value has since been overbalanced by the obvious constitutional deprivations of petitioners' and other employees' rights to liberty in the work place, especially with respect to the immunity from suit these statutes afford employers and their "employees" for intentional torts. It makes a mockery of law to set forth statutory duties of employers concerning the health and welfare of their employees, but, at the same time, allowing and encouraging them to wantonly violate such duties with a minimum of economic risk.

AS TO QUESTION 2

An equal treatment of similarly situated persons by state laws is the essence of equal protection. When the result of a state legislative scheme is to create a class of persons who receive inferior treatment under the law, the state has a heavy burden of showing the basis for such classification is reasonable and substantial. A classification, "must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. vs. Virginia,* 253 U.S. 412, 40 Supreme Court Reporter 560, (1919), 415. State legislation which inherently deprives persons of constitutional rights must be confined to the narrowest possible means of achieving any legitimate legislative purpose. *Dunn vs. Blumstein,* 405 U.S. 330, *supra*; *Kusper vs. Pontikas,* 414 U.S. 51, *supra*. When a statutory classification appears, on its face to create substantial deprivations of constitutional rights for the members of the class, the state must meet certain standards of proof in order to justify the overall constitutionality of the legislative scheme maintaining that class. This Court has outlined the standard in *In Re: Griffiths,* 413 U.S. 717, 37 Lawyer's Edition 2d 910, 93 Supreme Court 2851 (1972), 721 and 722:

> . . . "In order to justify the use of a suspect classification, a state must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest."

Also, see *McLaughlin vs. Florida,* 379 U.S. 184, 13 Lawyer's Edition 2d 222, 85 Supreme Court 283 (1964), 196. In this respect, the Court's attention is directed to the fact that the

statutes at issue not only take away petitioners' rights to an action in negligence, but any and all court actions, including actions for intentional torts.

Article II, Section 35, Ohio Constitution, was enacted as a result of the Ohio Constitutional Convention of 1912, but the original section was amended in 1924 to remove the right of an employee to sue for intentional torts or violations of state law. The Ohio Legislature does not maintain a record of its legislative history, but the official minutes of the debates of the 1912 Ohio Constitutional Convention indicate clearly that promoting safety in the work place was a major object of Ohio Constitution, Article II, Section 35:

> . . . "The real object of all liability and compensation laws against industrial accidents, however, is not simply a matter of providing for the needs of the injured and the dependents of those killed, but to prevent accidents; hence, the provision in the proposal that in case accidents are caused by the willful act or violation of law by an employer, an additional penalty is added by giving the worker the right to sue for additional damages. This provision has been made a part of every compensation law so far adopted in this country, as it is with every compensation law so far adopted by foreign countries, and is necessarily attached to compensation laws so that the employer may be compelled to provide every safeguard possible against accidents, and that he may be prevented from getting careless because of the fact that he has paid a premium into the state insurance fund that will provide for the needs of his employees in case they are injured or killed." *Constitutional Convention of Ohio, Proceedings and Debates,* April 23, 1913, p. 1346.

This statement relating to Article II, Section 35, puts the constitutional deprivations at issue herein clearly in focus. Petitioners assert there is no substantial or necessary interest of the State of Ohio in separating out the herein petitioners from other Ohio plaintiffs who have been injured as a result of intentional torts or violations of law. On the contrary, the result of the legislative scheme is exactly opposite of its legislative purpose, for, in practice, the Ohio Workmen's Compensation system denies petitioners and similarly situated persons a fair and speedy system of compensation and encourages employers to create and maintain unsafe conditions in their work places.

In striking down the Ohio guest statute on Fourteenth Amendment grounds, the Ohio Supreme Court stated, in the case of *Primes vs. Tyler,* 43 Ohio State 2d 195, 331 NE 2d 723, (1975) 727:

> . . . "Recognizing that the arbitrary imposition of disabilities '. . . is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrong doing' (*Jimenez vs. Weinberger* [1974], 417 U.S. 628, 632), Chief Justice Burger states that '. . . the equal protection clause does enable us to strike down our discriminatory laws . . . where . . . the classification is justified by no legitimate state interest, compelling or otherwise.' (*Weber vs. Aetna Casualty & Surety Co.* [1972], 406 U.S. 154, 175-176)."

Petitioners situation is no different from those Ohio plaintiffs previously deprived of their rights of action because of the Ohio guest statute. In addition, the Ohio Legislature has recognized and foreclosed one avenue of possible abuse inherent in a no-fault compensation system for in-

dustrial injuries, by denying an employee the payment of benefits for "purposely self-inflicted" injuries. See Ohio Revised Code, Section 4123.54, Appendix D, p. 41. If a worker cannot purposely avail himself of Workmen's Compensation funds, a similar policy rationale should apply to the willful and intentional acts of his employer, who receives the full benefit of the statutory limitations on payments, which clearly fail to adequately compensate an injured worker for his damages.

AS TO QUESTION 3

The Fourteenth Amendment to the United States Constitution provides, *inter alia*, that—

> . . . "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

There can be no doubt that state action is present in the case at bar. The Ohio Workmen's Compensation laws at issue provide respondents with a complete bar to any and all court actions for injuries, filed by employees against employers and their "employee," when the employers are covered by that said Workmen's Compensation laws. Ohio courts have consistently held that the sole and sufficient remedy of an employee so situated lies with the Workmen's Compensation laws.

Respondents contend that the Ohio Workmen's Compensation laws provide for fair and speedy compensation for injuries, yet the statutory compensation scheme allows for the payment of only a portion of the total lost wages and makes no provision for the payment of damages for pain and suffering, loss of services of the spouse, and punitive

damages. During 1973, the maximum benefit allowable for a permanent and total disability was limited to two-thirds of the State's average weekly compensation, as calculated by the Ohio Bureau of Workmen's Compensation. For the present petitioners who are permanently and totally disabled, this amounts to $79.31 per week , or $4,124.12 per year. Under the Ohio Workmen's Compensation statutes, such payments are fixed in amount forever. The maximum death benefit is only $21,000.00. Many of the petitioners herein, and thousands of other, similarly situated persons in Ohio, have been reduced to a state of perpetual poverty by the Ohio Workmen's Compensation laws. The courts of Ohio have often cited the advantage of a speedy administrative procedure as a primary legislative basis for justifying the obvious constitutional deprivations arising out of the inadequate Workmen's Compensation benefits. In reality, since employers in Ohio have the right to appeal Workmen's Compensation awards not only through a regional Workmen's Compensation Board of Review, but also to the Ohio Common Pleas Court, Court of Appeals, and Ohio Supreme Court, such a basis for justification is wholly illusory.

The constitutional guarantee of due process will only apply where the petitioner has a legitimate "property" interest within the meaning of the Fourteenth Amendment. "Property" in a constitutional sense is not limited to formalistic rules of ownership and includes any significant property interest or entitlement. As this Court has observed in *Perry vs. Sindermann*, 408 U.S. 593, 33 Lawyer's Edition 2d 570, 92 Supreme Court 2694, (1971), 601:

> . . . "We have made clear in *Roth, supra* (*Board of Regents vs. Roth*, 408 U.S. 564, 33 Lawyer's Edition 2d 548, 92 Supreme Court 2701, (1971), at 571

through 572), that 'property' interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules of understandings.' i.d., at 577. A person's interests in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."

The right of petitioners herein to be adequately compensated for disabling injuries, especially when intentional torts are involved, clearly falls within the category of property rights protected by the Fourteenth Amendment. The statutes at issue herein totally bar petitioners' rights to be heard in the appropriate form wherein their property rights will be fairly and adequately protected. In a most fundamental sense, the Fourteenth Amendment guarantees the petitioners the right to be heard in a forum where adequate compensation is possible. This Court has ably recognized in *Fuentes vs. Shevin*, 407 U.S. 67, (1972), 81, that the Fifth and Fourteenth Amendments of the United States Constitution specifically guarantee persons the right to a fair and appropriate hearing when the taking of a person's property is at issue:

> . . . "The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property. When a person has an opportunity to speak up in his own defense, when the state must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interest can be prevented."

The total denial of petitioners' rights of access to the Courts of Ohio, the only historically adequate forum wherein petitioners can be fairly compensated, is repugnant to the Fifth and Fourteenth Amendments of the United States Constitution.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a review of the arbitrary unfair and dangerous practices created and maintained by Article II, Section 35, of the Ohio Constitution and Sections 4123.74 and 4123.741 of the Ohio Revised Code is urgently necessary. It is further respectfully submitted that this Petition for a Writ of Certiorari to the Supreme Court of Ohio should be granted.

Respectfully submitted,

PHILIP R. BRADLEY
BRADLEY & FARRIS
1620 East Broad St.
Columbus, Ohio 43203
Attorneys for Petitioners

APPENDICES

APPENDIX A-1

DECISION OF COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

(Rendered, February 3, 1976)

Charles E. Allen, et al., :
Plaintiffs-Appellants, :
vs. : No. 75AP-365
Eastman Kodak Co., et al., :
Defendants-Appellees. :

HOLMES, J.

This matter involves the appeal of a summary judgment of the Common Pleas Court of Franklin County as granted to certain of the defendants in an action brought by these plaintiff employees of the defendant Borden, and its Columbus Coated Fabrics Division, against such employer, as well as a number of manufacturers and distributors of certain chemicals used by the Columbus Coated Fabrics company in its manufacturing process, which chemicals were alleged to have occasioned serious and crippling injuries to the plaintiff employees.

The complaint also named as defendants Mr. Edward L. Mahoney, the president of Columbus Coated Fabrics, Mr. Dewey Bennett, the safety director of such company, and Dr. William T. Paul, the physician of Columbus Coated Fabrics.

The defendant employer, as well as Mr. Mahoney, Mr. Bennett, and Dr. Paul, filed motions for summary judgment. Such motions were based upon Article II, Section 35, of the

Ohio Constitution, R.C. 4123.74, which legal provisions preclude an action for damages by an employee against his own employer, and upon R.C. 4123.741, which precludes an action for damages by "any other employee" as against any "employee of any employer."

Upon granting summary judgment for these defendants herein named, the claims as against the manufacturers and distributors of the complained of chemicals were left pending for further proceedings.

The assignments of error of the plaintiffs-appellants are as follows:

"1. The trial court erred in sustaining the Defendants' Borden, Inc., Edward L. Mahoney, Dewey Bennett, and William T. Paul's Motion for a Summary Judgment on the basis of the Ohio Workmen's Compensation laws, Article II, Section 35, Ohio Constitution; and Sections 4123.74 and 4123.741, Revised Code, for these Sections unconstitutionally deprived the Plaintiffs of their 5th Amendment, U.S. Constitution, right to property without due process.

"2. The trial court erred in sustaining the Defendants' Borden, Inc., Edward L. Mahoney, Dewey Bennett, and William T. Paul's Motion for a Summary Judgment on the basis of the Ohio Workmen's Compensation laws, Article II, Section 35, Ohio Constitution; and Sections 4123.74 and 4123.741, Revised Code, for these Sections unconstitutionally deprived the Plaintiffs of their 5th Amendment, U.S. Constitution, right to life and liberty without due process of law.

"3. The trial court erred in sustaining the Defendants' Borden, Inc., Edward L. Mahoney, Dewey Bennett, and William T. Paul's Motion for a Summary Judgment on the basis of the Ohio Workmen's Compensation laws, Article II, Section 35, Ohio Constitution; and Sections 4123.74 and 4123.741, Revised Code, for these Sections unconstitutionally deprived the Plaintiffs of their 14th Amendment, U.S. Constitution, right to equal protection of the laws."

Basically, such assignments of error, and the rather voluminous brief as filed by the plaintiffs-appellants in support thereof, argue that the workmen's compensation law of the state of Ohio, as provided for by the Ohio Constitution and statutory enactment, is contrary to the Constitution of the United States in that such law denies these and other Ohio employees the due process of law as provided by the Fifth Amendment to the Constitution, and denies such employees the "equal protection" of the law as provided for by the Fourteenth Amendment to the Constitution.

We must reject all of the plaintiffs-appellants' assignments of error.

Much of the appellants' argument in support of their claim of unconstitutionality of the workmen's compensation law is based upon their premise that the courts must review the purposes and the legislative intent of such state laws in the light of the changing patterns of manufacturing processes, and the increased use of new and exotic, and potentially physically dangerous, types of chemicals and synthetics.

The argument takes the form that such new and dangerous chemicals could not have been in the minds of the framers of the provisions of the Constitution of the State of Ohio and the minds of the legislative body when such code

sections were enacted, as such would relate to the right of action that employees should be ever granted where personal injuries have been received. Plaintiffs further emphasize that the continuing right to bring legal action for injuries sustained in the course of one's employment should particularly not be denied where it is shown that the employer has not complied with certain safety standards for the protection of such employees.

A number of cases as cited by the appellants in support of such aforestated propositions were decided prior to the adoption of the fountainhead for the authority of the original workmen's compensation provision, Article II, Section 35, of the Ohio Constitution, as adopted in 1912.

Such constitutional provision provided generally for the elimination of the rights of action by employees as against employers for injuries received by the employees. This provision initially provided that rights of action could still be maintained where "lawful requirements" for the protection of lives, health and safety of employees had not been met.

However, effective January 1, 1924, this latter reference to rights of action where "lawful requirements" were not met was amended to specifically preclude a suit for damages by an employee as against an employer covered by the Workmen's Compensation Act, such amendment being in the following terms:

"* * * Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. * * *"

This constitutional provision has been implemented by the Workmen's Compensation Act which prohibits negligence actions by employees as against a covered employer for injuries received while in the course of their employment, but provides for compensation for injuries or death in conformity with the procedures, findings, and schedules of the Industrial Commission pursuant to the authorization of such chapter of law.

Also, if there be a violation of specific safety requirements as established by the commission, an additional recovery may be awarded pursuant to the following provisions of this constitutional section:

> "* * * Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employes, enacted by the General Assembly or in the form of an order adopted by such board, and its decision shall be final; and for the purpose of such investigations and inquiries it may appoint referees. When it is found, upon hearing, that an injury, disease, or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and paid in like manner as other awards; * * *"

In conformity with such constitutional authority, the General Assembly created the Industrial Commission of Ohio and enacted Chapter 41 of Ohio Laws, the chapter of law providing for workmen's compensation, and sections of law providing for the general standards and duties of care as owed by an Ohio Employer to his employees, and to those known as "frequenters," who regularly come upon the premises of the employer.

The Supreme Court of Ohio, prior to the 1924 amendment of Article II, section 35, held that these workmen's compensation laws "embodying in general terms duties and obligations of care and caution," were lawful requirements within the meaning of the Ohio Constitution, and thence held that an action could be brought by an employee as against an employer. *The Ohio Automatic Sprinkler Co. v. Fender* (1923), 108 Ohio St. 149. This interpretation of the workmen's compensation laws was again followed in the case of *Winzeler v. Knox* (1924), 109 Ohio St. 503.

However, as stated, the adoption of the amendment to Article II, section 35, specifically precluded such a suit by an employee, and such language of the amendment stated in effect that the compensation as received by an employee pursuant to laws provided for the compensation of employee injuries, "shall be in lieu of all other rights to compensation or damages * * *."

In harmony with this provision of the Constitution, as amended, was the enactment of R.C. 4123.74, which provides:

> "Employers who comply with section 4123.35 of the Revised Code shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease, or bodily condition,

> received or contracted by any employee in the course of or arising out of his employment, or for any death resulting from such injury, occupational disease, or bodily condition occurring during the period covered by such premium so paid into the state insurance fund, or during the interval of time in which such employer is permitted to pay such compensation directly to his injured employees or the dependents of his killed employees, whether or not such injury, occupational disease, bodily condition, or death is compensable under sections 4123.01 to 4123.94, inclusive, of the Revised Code."

Since such constitutional amendment, and this specific code section, the Ohio Supreme Court, and other courts in Ohio, have uniformly held that an employee may not sue a complying employer for damages for injuries sustained in his employment. Examples of such cases propounding such law are *State, ex rel. Turner, v. United States Fidelty Co.* (1917), 96 Ohio St. 250; *State, ex rel. Engle, v. Industrial Commission* (1944), 142 Ohio St. 425; *Sebek v. Cleveland Graphite Bronze Co.* (1947), 148 Ohio St. 693; *Bevis v. Armco Steel Corp.* (1949), 86 Ohio App. 525 (appeal dismissed 153 Ohio St. 360); *Greenwalt v. Goodyear Tire & Rubber Co.* (1955), 164 Ohio St. 1; *Daniels v. MacGregor Co.* (1965), 2 Ohio St. 2d 89; and *State, ex rel. Allied Chemical Corp., v. Earhart, Judge,* (1974), 37 Ohio St. 2d 153.

As noted here, the main thrust of the appellants' argument within this appeal is to the effect that these workmen's compensation laws, as interpreted by the Ohio courts, unreasonably limit the rights of an employee to be "fully compensated" for his injuries received within the course of his employment, and in effect force the employee to accept the smaller amount of compensation provided for by the

workmen's compensation law. Such resultant, argue the appellants, is an unconstitutional denial of the employee's right of "due process" and "equal protection" of the law.

The initial portion of the appellant's argument, to the effect that "full compensation" in the form of pain and suffering, and punitive damages, has been denied an employee by the workmen's compensation laws, was early laid to rest in the decision of the Supreme Court of Ohio in the case of *State, ex rel. Crawford v. Industrial Commission* (1924), 110 Ohio St. 271, which decision, as aptly pointed to by counsel for the appellees, quite artfully points out the nature and benefits of these laws. We find the following statement in the decision of the court, at page 274:

> "* * * we particularly agree that the law is founded upon the principle of insurance, and that it is in no sense a pension, or bounty, or gratuity. On the other hand, we do not think any one would contend that either the Constitution framers or the General Assembly have ever entertained the thought that full compensation would be made in every case. Before the enactment of this legislation, the only means of compensating injured employes was by means of the ordinary negligence action, and unless negligence could be shown no compensation was recoverable. It was not even in all cases of negligence that there could be a recovery, because there were many defenses that prevented recovery even though negligence of the employer might be proven. * * * It is neither an award of damages nor the imposition of a penalty. It recognizes the fact that the risk of injury or death is an incident of employment in industry, and that this risk has

grown constantly greater by reason of the constantly increasing use of machinery. * * * It was never intended by the most ardent advocates of workmen's compensation to give full and adequate remuneration, because this would remove much of the inducement of working men to exercise care and caution on their own part. At the same time it was plainly seen that industry could not bear an unjust burden, and that any burden so imposed must eventually be charged back in large measure to the consumers of the product of industry. It was therefore sought to provide a reasonable compensation for all injured employes, rather than to give full compensation to the victims of negligence and deny all compensation whatever to employes injured by accidental causes. Our Constitution framers and legislators have had all these matters in mind in determining a sound policy for the establishment and administration of workmen's compensation insurance. This court has nothing to do with the soundness of those policies, and the only justification for a discussion of them in this opinion is to aid in the proper interpretation of the constitutional and statutory provisions."

No Ohio cases have been cited herein which speak directly to the federal constitutional arguments as advanced by these appellants. However, the Supreme Court of the United States, and the Supreme Courts of other states, have upheld other similar statutory provisions as against claims of unconstitutionality.

As pointed out by the appellees herein, the United States Supreme Court considered three coordinated cases involving the constitutionality of the workmen's compensation laws of

the states of New York, Iowa and Washington, in the cases of *New York Central Railroad Co. v. White* (1917), 243 U.S. 188, *Hawkins v. Bleakly* (1917), 243 U.S. 210, and *Mountain Timber Co. v. State of Washington*(1917), 243 U.S. 219.

In upholding the workmen's compensation law of New York, the Supreme Court set forth the following syllabus in the case of *New York Central Railroad Co. v. White, supra:*

> *"Held:* (1) That neither (a) in rendering the employer liable irrespective of the doctrines of negligence, contributory negligence, assumption of risk and negligence of fellow servants, nor (b) in depriving the employee, or his dependents, of the higher damages which, in some cases, might be recovered under those doctrines, can the act be said to violate due process.
>
> "(2) That viewed from the standpoint of natural justice, the system provided by the act in lieu of former rules is neither arbitrary nor unreasonable.
>
> "* * *
>
> "The common-law rules respecting the rights and liabilities of employer and employee in accident cases, viz., negligence, assumption of risk, contributory negligence, fellow-servant doctrine, as rules defining legal duty and guiding future conduct, may be altered by state legislation, and even set aside entirely - at least if some reasonably just substitute be provided."

In amplification of the rationale of these principles, we find the following within the decision, at page 197 thereof:

> "In considering the constitutional question, it is necessary to view the matter from the standpoint of the employee as well as from that of the employer.

For, while plaintiff in error is an employer * * * the exemption from further liability is an essential part of the scheme, so that the statute if invalid as against the employee is invalid as against the employer.

"The close relation of the rules governing responsibility as between employer and employee to the fundamental rights of liberty and property is of course recognized. But these rules, as guides of conduct, are not beyond alteration by legislation in the public interest. No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit. * * * The common law bases the employer's liability for injuries to the employee upon the ground of negligence; but negligence is merely the disregard of some duty imposed by law; and the nature and extent of the duty may be modified by legislation, with corresponding change in the test of negligence. * * *"

The Supreme Court, in *Hawkins v. Bleakly, supra,* in reviewing the workmen's compensation law of Iowa, held as syllabus law of the case the following:

"* * * A Workmen's Compensation Act, which, prescribing the measure of compensation and the circumstances under which it is to be made, establishes a method of applying the measure to the facts of each case by due hearings before an administrative tribunal, whose action upon all fundamental and jurisdictional questions is subject to judicial review, is not open to objection upon the ground that it clothes the administrative body with an arbitrary and unbridled discretion in violation of due process of law."

Similarly, in the case of *Middleton v. Texas Power & Light Co.* (1918), 249 U.S. 152, the Supreme Court of the United States reviewed the Texas workmen's compensation act, and specifically rejected the assertion that workmen's compensation laws constitute "deprivation of liberty and property without due process of law," and further rejected the claim that such act denied employees affected by the act equal protection of the law.

In *Keller v. Dravo Corporation* (1971), 441 F. 2d 1239 (Fifth Circuit, cert. denied 404 U.S. 1017), the plaintiff contended that "he was unconstitutionally deprived of a property right"—his "right to sue his employer and fellow servants for damages—by the provisions of the Longshoremen's and Harbor Workers' Compensation Act. In rejecting this contention, the court stated that "one cannot be heard to question the sufficiency of due process if the rule of law, which merely held the potential to create a property right, was changed before any right vested," and concluded that "This latter situation is precisely what obtains in the instant case."

In *Massey v. Thiokol Chemical Corporation* (1973), 368 F. Supp. 668 (D.C., S.D. Ga.), the claim that the workmen's compensation law of Georgia denied "due process" and "equal protection" because of denial of "all common law and other remedies to covered employees and their dependents" was rejected.

In *Kaznoski v. Consolidation Coal Company* (1974), 368 F. Supp. 1022 (D.C., W.D. Pa.), it was held that the West Virginia workmen's compensation act was not a violation of "due process" by virtue of "the loss of one's right to sue."

It is difficult, if not impossible, to enact perfect legislation pertaining to any field of human endeavor or needs. The laws relating to workmen's compensation, the Industrial

Commission, and the provisions of law enacted to compensate employees for their work-related injuries, and to provide for relief from civil suit to the covered employer, is no exception to the general rule.

Apropos to this point, it is interesting to note that the Ohio General Assembly is currently reviewing the Ohio Laws in this general field and particularly those that relate to the makeup, powers and duties of the Industrial Commission.

The workmen's compensation laws of the state of Ohio may well not be perfection in their attempt to compensate employees for their injuries, but they do indeed provide a reasonably equitable balance between the rights, duties and privileges of both the employee and the employer.

Although these statutes as written, and as administered by the administrator, and the Industrial Commission, may need amendments in certain respects, such laws are not unreasonable or unfair in the constitutional sense. We believe that these laws have provided a fair and reasonable opportunity for employees to be compensated for their injuries, and an opportunity for the families of deceased employees, who have succumbed from industrial injuries, to receive survivor benefits for their reasonable aid and care.

We find no unconstitutional denial of due process, nor a denial of the equal protection of the law, on the face of such statutes. Nor do we find that these plaintiffs have been treated unfairly or unreasonably in the interpretation or application of such laws to their claimed right to relief.

Therefore, all of the assignments of error as set forth by the plaintiffs-appellants are hereby dismissed, and the judgment of the Common Pleas Court of Franklin County is hereby affirmed.

STRAUSBAUGH, P.J. and MCCORMAC, J. concur.

APPENDIX A-2

JOURNAL ENTRY OF JUDGMENT IN COURT OF APPEALS, FRANKLIN COUNTY, OHIO

John W. Horn	:	
Plaintiff-Appellant	:	CASE NO. 76AP-35
vs	:	
Eastman Kodak Co., et al.	:	
Defendants-Appellees	:	

By agreement of the parties and with leave of Court, the decision of the Court in *Charles E. Allen, et al. vs. Eastman Kodak Co., et al.* Case No. 75AP-365, is hereby adopted as the decision in the consolidated appeal in Case No.'s 76-AP-35, 76AP-36, and 76AP-14. For the reasons stated in the decision of the Court, all Plaintiffs-Appellants' assignments of error are overruled, and it is the JUDGMENT AND ORDER of this Court that the final judgments of the Common Pleas Court of Franklin County, Ohio, filed and journalized on December 31, 1975, December 31, 1975, and December 2, 1975, respectively, which granted summary judgment in favor of Defendants-Appellees Borden, Inc., Columbus Coated Fabrics Division, Edward L. Mahoney, Dewey Bennett, and Dr. William T. Paul and against the Plaintiffs-Appellants with respect to their claims against the Defendants-Appellees is affirmed.

/s/ Robert E. Holmes
JUDGE

/s/ Dean Strausbaugh
JUDGE

/s/ John W. McCormac
JUDGE

APPROVED:

/s/ Philip R. Bradley (WK)
BRADLEY & FARRIS
PHILIP R. BRADLEY
Attorney for Appellant

/s/ Robert E. Leach
VORYS, SATER, SEYMOUR & PEASE
ROBERT E. LEACH
Attorneys for Appellees Borden, Inc., Edward L. Mahoney & Dewey Bennett

/s/ Earl F. Morris
WRIGHT, HARLOR, MORRIS & ARNOLD
EARL F. MORRIS
Attorney for Defendants William T. Paul, M.D., Appellee

APPENDIX B-1

ORDER OF SUPREME COURT OF OHIO

1976 Term

(September 10, 1976)

Charles E. Allen, et al.,	:	Case No. 76-361
Appellants,	:	**Motion for an Order**
vs.	:	**Directing Court of Appeals**
Eastman Kodak Co.,	:	**for Franklin County**
Appellees.	:	**To Certify Its Record**

It is ordered by the Court that this motion is overruled.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Thomas L. Startzman
Clerk

APPENDIX B-2

ORDER OF SUPREME COURT OF OHIO
1976 Term
(September 10, 1976)

John W. Horn, et al.,	:	Case No. 76-759
Appellants,	:	**Motion for Order Directing**
vs.	:	**The Court of Appeals**
Eastman Kodak Co., et al.,	:	**for Franklin County**
Appellees.	:	**To Certify Its Record**

It is ordered by the Court that this motion is overruled.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Thomas L. Startzman
Clerk

APPENDIX C-1

ORDER OF SUPREME COURT OF OHIO
1976 Term
(September 10, 1976)

Charles E. Allen, et al.,	:	No. 76-361
Appellants,	:	**Appeal From**
vs.	:	**Court of Appeals**
Eastman Kodak Co., et al.,	:	**For Franklin County**
Appellees.		

This cause, here on appeal as of right from the Court of Appeals for Franklin County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court, sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Thomas L. Startzman
Clerk

APPENDIX C-2
ORDER OF SUPREME COURT OF OHIO
1976 Term

(September 10, 1976)

John W. Horn, et al.,	:	Case No. 76-759
Appellants,	:	**Appeal From**
vs.	:	**Court of Appeals**
Eastman Kodak Co., et al.,	:	**For Franklin County**
Appellees.		

This cause, here on appeal as of right from the Court of Appeals
for Franklin County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Thomas L. Startzman
Clerk

APPENDIX D
CONSTITUTION OF THE UNITED STATES
Amendment V

Rights of Persons

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Rights of Citizens

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF OHIO

Article II

Section 35 Workmen's compensation.

For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all right of claimants thereto. Such board shall set aside as a separate fund such proportion of the contributions paid by employers as in its judgment may be necessary, not to exceed one per centum thereof in any year, and so as to equalize, insofar as possible, the burden thereof, to be expended by such board in such manner as may be provided by law for the investigation and prevention of industrial accidents and diseases. Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of

employes, enacted by the General Assembly or in the form of an order adopted by such board, and its decision shall be final; and for the purpose of such investigations and inquiries it may appoint referees. When it is found, upon hearing, that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and paid in like manner as other awards; and, if such compensation is paid from the state fund, the premium of such employer shall be increased in such amount covering such period of time as may be fixed, as will recoup the state fund in the amount of such additional award notwithstanding any and all other provisions in this constitution. (As amended November 6, 1923. To take effect January 1, 1924).

OHIO REVISED CODE

Section 4101.11 Duty of employer to protect employees and frequenters.

Every employer shall furnish employment which is safe for the employees engaged therein, shall furnish a place of employment which shall be safe for the employees therein and for frequenters thereof, shall furnish and use safety devices and safeguards, shall adopt and use methods and processes, follow and obey orders, and prescribe hours of labor reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees and frequenters.

Section 4101.12 Duty of employer to furnish safe place of employment.

No employer shall require, permit, or suffer any employee to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide, and use safety devices and safeguards, or fail to obey and follow orders or to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe. No employer shall fail to do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees or frequenters. No such employer or other person shall construct, occupy, or maintain any place of employment that is not safe.

Section 4123.01 Definitions.

As used in Chapter 4123. of the Revised Code:

(A) "Employee," "workmen," or "operative" means:

(1) Every person in the service of the state, or of any county, municipal corporation, township or school district therein, including regular members of lawfully constituted police and fire departments of municipal corporations and townships, whether paid or volunteer, and wherever serving within the state or on temporary assignment outside thereof, and executive officers of boards of education, under any appointment or contract of hire, express or implied, oral or written, including any elected official of the state, or of any county, municipal corporation, or township or members of boards of education;

(2) Every person in the service of any person, firm, or private corporation, including any public service corporation, that (a) employs one or more workmen or operatives regularly in the same busniness or in or about the same establishment under any contract of hire, express or implied, oral or written,

including aliens and minors, household workers who earn fifty dollars or more in cash in any calendar quarter from a single household and casual workers who earn fifty dollars or more in cash in any calendar quarter from a single employer, or (b) is bound by any such contract of hire or by any other written contract, to pay into the state insurance fund the premiums provided by Chapter 4123. of the Revised Code.

Every person in the service of any independent contractor or subcontractor who has failed to pay into the state insurance fund the amount of premium determined and fixed by the industrial commission for his employment or occupation or to elect to pay compensation directly to his injured and to the dependents of his killed employees, as provided in section 4123.35 of the Revised Code, shall be considered as the employee of the person who has entered into a contract, whether written or verbal, with such independent contractor unless such employees or their legal representatives or beneficiaries elect, after injury or death, to regard such independent contractor as the employer.

(3) If an employer is a partnership, or sole proprietorship, such employer may elect to include as an "employee" within this chapter, any member of such partnership, or the owner of the sole proprietorship. In the event of such election, the employer shall serve upon the commission written notice naming the persons to be covered, include such employee's remuneration for premium purposes in all future payroll reports, and no such proprietor, or partner shall be deemed an employee within this division until such notice has been served.

(B) "Employer" means:

(1) The state, including state hospitals, each county, municipal corporation, township, school district, and hospital owned by a political subdivision or subdivisions other than the state;

(2) Every person, firm, and private corporation, including any public service corporation, that (a) has in service one or more workmen or operatives regularly in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written, or (b) is bound by any such contract of hire or by any other written contract, to pay into the insurance fund the premiums provided by Chapter 4123. of the Revised Code.

All such employers are subject to Chapter 4123. of the Revised Code. Any member of a firm or association, who regularly performs manual labor in or about a mine, factory, or other establishment, including a household establishment, shall be considered a workman or operative in determining whether such person, firm, or private corporation, or public service corporation, has in its service, one or more workmen and the income derived from such labor shall be reported to the Industrial Commission as part of the payroll of such employer, and such member shall thereupon be entitled to all the benefits of an employee.

(C) "Injury" includes any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment.

(D) "Child" includes a posthumous child and a child legally adopted prior to the injury.

Section 4123.54 Compensation in case of injury or death; agreement if work performed in another state.

Every employee, who is injured or who contracts an occupational disease, and the dependents of each employee who is killed, or dies as the result of an occupational disease contracted in the course of employment, wherever such injury has occurred or occupational disease has been contracted, provided the same were not purposely self-inflicted, is entitled to receive, either directly from his employer as provided in section 4123.35 of the Revised Code, or from the state insurance fund, such compensation for loss sustained on account of such injury, occupational disease or death, and such medical, nurse, and hospital services and medicines, and such amount of funeral expenses in case of death, as are provided by sections 4123.01 to 4123.94, inclusive, of the Revised Code.

Whenever, with respect to an employee of an employer who is subject to and has complied with sections 4123.01 to 4123.94, inclusive, of the Revised Code, there is possibility of conflict with respect to the application of workmen's compensation laws because the contract of employment is entered into and all or some portion of the work is or is to be performed in a state or states other than Ohio, the employer and the employee may agree to be bound by the laws of this state or by the laws of some other state in which all or some portion of the work of the employee is to be performed. Such agreement shall be in writing and shall be filed with the industrial commission within ten days after it is executed and shall remain in force until terminated or modified by agreement of the parties similarly filed. If the agreement is to be bound by the laws of this state and the employer has complied with sections 4123.01 to 4123.94, inclusive, of the Revised Code, then the employee is entitled to compensation and benefits

regardless of where the injury occurs or the disease is contracted and the rights of the employee and his dependents under the laws of this state shall be the exclusive remedy against the employer on account of injury, disease, or death in the course of and arising out of his employment. If the agreement is to be bound by the laws of another state and the employer has complied with the laws of that state, the rights of the employee and his dependents under the laws of that state shall be the exclusive remedy against the employer on account of injury, disease, or death in the course of and arising out of his employment without regard to the place where the injury was sustained or the disease contracted.

If any employee or his dependents are awarded workmen's compensation benefits or recover damages from the employer under the laws of an other state, the amount so awarded or recovered, whether paid or to be paid in future installments, shall be credited on the amount of any award of compensation or benefits made to the employee or his dependents by the industrial commission.

If an employee is a resident of a state other than this state and is insured under the workmen's compensation law or similar laws of a state other than this state, such employee and his dependents are not entitled to receive compensation or benefits under sections 4123.01 to 4123.94, inclusive, of the Revised Code, on account of injury, disease, or death arising out of or in the course of employment while temporarily within this state and the rights of such employee and his dependents under the laws of such other state shall be the exclusive remedy against the employer on account of such injury, disease, or death.

Section 4123.74 Employer's liability in damages.

Employers who comply with section 4123.35 of the Revised Code shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease, or bodily condition, received or contracted by any employee in the course of or arising out of his employment, or for any death resulting from such injury, occupational disease, or bodily condition occurring during the period covered by such premium so paid into the state insurance fund, or during the interval of time in which such employer is permitted to pay such compensation directly to his injured employees or the dependents of his killed employees, whether or not such injury, occupational disease, bodily condition, or death is compensable under sections 4123.01 to 4123.94, inclusive of the Revised Code.

Section 4123.741 Fellow employee's immunity from suit.

No employee of any employer, as defined in division (B) of section 4123.01 of the Revised Code, shall be liable to respond in damages at common law or by statute for any injury or occupational disease, received or contracted by any other employee of such employer in the course of and arising out of the latter employee's employment, or for any death resulting from such injury or occcupational disease, on the condition that such injury, occupational disease, or death is found to be compensable under sections 4123.01 to 4123.94, inclusive, of the Revised Code.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-800

CHARLES E. ALLEN
and
JOHN W. HORN, et al.
Petitioners,

vs.

COLUMBUS COATED FABRICS,
A DIVISION OF BORDEN CHEMICAL CO.,
EASTMAN KODAK COMPANY, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION FOR RESPONDENTS, BORDEN, INC., EDWARD L. MAHONEY AND DEWEY BENNETT

ROBERT E. LEACH
52 East Gay Street
Columbus, Ohio 43215
Counsel of Record for Respondents,
BORDEN, INC.,
EDWARD L. MAHONEY AND DEWEY BENNETT

(Continued on inside cover)

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

OF COUNSEL:

EDGAR A. STRAUSE
VORYS, SATER, SEYMOUR AND PEASE
52 East Gay Street
Columbus, Ohio 43215

WALTER W. KOCHER
HARVEY A. ROSENZWEIG
180 East Broad Street
Columbus, Ohio 43215

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-800

CHARLES E. ALLEN
and
JOHN W. HORN, et al.
Petitioners,

vs.

COLUMBUS COATED FABRICS,
A DIVISION OF BORDEN CHEMICAL CO.,
EASTMAN KODAK COMPANY, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION FOR RESPONDENTS, BORDEN, INC., EDWARD L. MAHONEY AND DEWEY BENNETT

OPINIONS BELOW

The Supreme Court of Ohio, in denying motions to certify and *sua sponte* dismissing the appeals for the reason that "no substantial constitutional questions exists herein," rendered no opinion. The decision of

the Court of Appeals for Franklin County in the Charles E. Allen, et al. case is set forth at pp. 16-28 of the Petition. The decision of the trial court in the case is set forth herein as Appendix A-1, *infra*, p. 15. The judgment entry of the trial court sustaining motions of respondents for summary judgment in their favor is set forth herein as Appendix A-2, *infra*, p. 17. None of the decisions herein have been reported.

JURISDICTION

This Court, admittedly, has jurisdiction by virtue of the provisions of 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether the "exclusive remedy" provisions of the Ohio Constitution and Ohio Statutes, which preclude recovery of damages at common law by an employee from his own employer who is complying with the provisions of the Ohio Workmen's Compensation Act, or the recovery of damages from other employees of such employer, for injuries sustained by the employee in the course of and arising out of his employment, are unconstitutional as depriving such employees "of life, liberty or property, without due process of law" in violation of the Fifth Amendment and the Fourteenth Amendment, or as denying such employees "the equal protection of the laws" in violation of the Fourteenth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provision of the Ohio Constitution, claimed by petitioners to be unconstitutional, is Article II, Section 35. Its full text, as amended in 1924, and now in full

force and effect, appears at pp. 36 and 37 of the Petition.

The Ohio Statutes, claimed to be unconstitutional, are Sec. 4123.74 and 4123.741 of the Ohio Revised Code. Their full text is set forth at p. 43 of the Petition.

STATEMENT OF THE CASE

Each of the petitioners herein are, or were at all times relevant to the issues involved, employees of respondent, Borden, Inc., at its Columbus Coated Fabrics plant. At the trial court and at the intermediate court level four separate cases were involved. Three were consolidated in the Supreme Court of Ohio, resulting in two case numbers in that court. In view of the agreement of counsel at that time that the Allen case ruling would be dispositive of the Horn case, further reference will be limited herein to the Allen case. In effect, the Petition herein has followed this same procedure.

The Complaints filed in each of these cases, except for the names of the plaintiffs, were identical.

On the basis of allegations that each "suffer from various stages of peripheral neuropathy," resulting from having been "exposed to the fumes and otherwise noxious characteristics of MBK and MEK within the scope of their employment," suits were filed by petitioners against designated manufacturers and distributors of MBK and MEK—chemicals used by Borden in its manufacturing process at Columbus Coated Fabrics—and in the same Complaints suit was also filed against Borden, Edward L. Mahoney, Dewey Bennett and Dr. William Paul. Mahoney was employed by Borden as President of its Columbus Coated Fabrics

(CCF) Division. Bennett was employed as Safety Director. Dr. Paul, represented by other counsel, was named as a defendant as having then been employed by Borden "in his professional capacity."

Recovery of damages was sought from the manufacturers and distributors of MBK and MEK on the basis of allegations of negligence, express warranty, implied warranty and placing "unsafe and unreasonably dangerous" products "upon the market."

Recovery of damages from Borden, Mahoney, Bennett and Paul was sought on the basis of various allegations of "knowledge and notice" of the existence of "serious health hazards," of failing to "correct said conditions," of failing to "warn plaintiffs of the dangers," of failing to "report" such conditions to various state and federal agencies, and, after having reported such conditions to governmental agencies, of failing to "implement and obey" various orders of governmental agencies. The Complaint (¶ 32) alleged that such acts "of omission and commission" constituted "negligence" and (¶ 38) that they "were intentional, malicious, and in willful and wanton disregard of their duty to protect the health of the plaintiffs."

Omitting names and addresses of numerous plaintiffs and numerous defendants, the full text of the Complaint in the Allen case is set forth herein as Appendix B, *infra*, p. 20.

Motions for summary judgment were filed in the Common Pleas Court on behalf of Borden, Mahoney, Bennett and Paul, accompanied by proof that Borden was a complying employer, having been granted authority by the Ohio Industrial Commission to pay compensation directly to its injured employees, and proof by affidavit that 60 of plaintiffs had already filed

claims for workmen's compensation benefits, all of which had been allowed, and listing the monetary compensation theretofor paid to them by Borden.

No counter-affidavits or other documentary evidentiary statements were filed in opposition to the motions for summary judgment, as authorized by Rule 56 of the Ohio Rules of Civil Procedure, and the motions for summary judgment filed in the trial court on February 19, 1975 were ultimately sustained by decision of the trial court of June 23, 1975 (Appendix A-1 herein, p. 15).

The claims for damages against the manufacturers and suppliers of the chemicals in question are still pending in the trial court. Pursuant to the provisions of Rule 54(B) of the Ohio Rules of Civil Procedure, the Common Pleas Court entered final judgment in favor of Borden, Mahoney, Bennett and Paul.

As noted in the Petition, the Court of Appeals of Franklin County, Ohio affirmed the judgment of the trial court in such respect in each of the cases, and thereafter the Supreme Court of Ohio overruled motions to certify the record and *sua sponte* dismissed the appeals.

Since the right of the petitioners, as employees, to sue their own employer and fellow employees for damages for injuries received in the course of and arising out of their employment was determined by the trial court under summary judgment proceedings, wherein the Complaint, the Motion for Summary Judgment and the Affidavits in support thereof constituted the entire record of the case, it is apparent that the statements appearing at p. 4 and at the top half of p. 5 of the Petition are nowhere reflected in any record. This being true, no useful purpose would be served by a detailed

recitation of the facts as we know them. Simply as a matter of public record, however, we would, and do, vehemently dispute the basic implications thereof. While there was an onset of apparent chemical induced nerve disease in September and October, 1973, its possible cause as allegedly resulting from exposure to MBK or MEK was neither known nor suspected prior to that time. The Occupational Safety and Health Administration investigation, referred to in such statement, had no relationship to the problem as it eventually developed.

In any event, we respectfully submit that such statements, being nowhere reflected in the record, are not in conformity to Rule 23 of the Rules of this Court with respect to the contents of a Petition for Certiorari.

STAGE OF PROCEEDINGS AT WHICH FEDERAL QUESTIONS WERE FIRST RAISED

The first claim made by counsel for petitioners raising any federal questions was in the memorandum in support of a motion requesting the trial court to reconsider its decision of June 23, 1975 sustaining Motions for Summary Judgment. It was contended there "that the Ohio Workmen's Compensation Laws, based on Article II, Section 35, of the Ohio Constitution, are unconstitutional under the 14th Amendment of the U.S. Constitution."

ARGUMENT

Essentially, it is the contention of counsel for petitioners that, as a matter of federal "due process" and "equal protection," petitioners have a "constitutional right" to "full compensation," including "damages for pain and suffering, loss of services of the spouse, and

punitive damages," enforceable by civil court action; that Article II, Section 35 of the Ohio Constitution and Sections 4123.74 and 4123.741, Ohio Revised Code, foreclose the petitioners from exercising this "right" and that the Ohio constitutional provisions and the statutes, therefore, are unconstitutional.

It is asserted (Petition, p. 15) that "[t]he total denial of petitioners' rights of access to the Courts of Ohio, the only historically adequate forum wherein petitioners can be fairly compensated, is repugnant to the Fifth and Fourteenth Amendments of the United States Constitution."

None of the cases cited, or referred to, in the Petition are supportive of any such claim. The only case referred to which related in any way to workmen's compensation laws is *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), holding that Louisana's denial of equal recovery rights to dependent, unacknowledged, illegitimate children violates the Equal Protection Clause of the Fourteenth Amendment. The claims of unconstitutionality advanced by petitioners are inferentially, but necessarily rejected in *Weber* wherein the opinion states (pp. 171-172):

> ". . . workmen's compensation codes represent outgrowths and modifications of our basic tort law. . . [They] removed difficult obstacles to recovery in work-related injuries by offering a *more certain*, though generally *less remunerative*, compensation." (Emphasis added)

The other cases, cited in the Petition involve such questions as the right to hearing prior to renewal of a nontenured teacher's contract [*Bd. of Regents* v. *Roth*, 408 U.S. 564 (1972)]; the validity of a one-year residence requirement for registration to vote [*Dunn*

v. *Blumstein*, 405 U.S. 330 (1972)]; the validity of prejudgment replevin laws [*Fuentes* v. *Shevin*, 407 U.S. 67 (1972)]; the validity of criminal statutes prohibiting unmarried, interracial couples from habitually occupying the same room in the nighttime [*McLaughlin* v. *Florida*, 379 U.S. 184 (1964)]; the denial to noncitizens of the United States of the right to take a State Bar examination [*In re Griffiths*, 413 U.S. 717 (1973)]; etc., have no possible relevancy with respect to the claims being advanced by petitioners.

Rule 19 of this Court relating to "Considerations Governing Review on Certiorari" provides:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.
>
> . . ."

Here, any potential federal question of substance has heretofore been determined by this Court in a long series of cases, involving not only the workmen's compensation laws of the various states but also federal workmen's compensation laws, such as the Longshoremen's and Harbor Workers' Compensation Act and the Federal Employees Compensation Act.

The constitutionality of the Ohio Workmen's Compensation Act was upheld in *Jeffrey Manufacturing Co.* v. *Blagg*, 235 U.S. 571 (1915).

In *Northern Pacific Ry. Co.* v. *Meese*, 239 U.S. 614 (1916), this Court rejected the claim that the Washington Workmen's Compensation Act was unconstitutional as a denial of equal protection of the law. It was recognized therein (p. 620) that the remedy provided to an injured workman by the Workmen's Compensation Act of Washington was intended "to be exclusive of every other remedy."

In three related decisions this Court upheld the constitutionality of the Workmen's Compensation Act of the states of New York, Iowa and Washington. *New York Central Railroad Company* v. *White*, 243 U.S. 188 (1916); *Hawkins* v. *Bleakley*, 243 U.S. 210 (1916); and *Mountain Timber Company* v. *State of Washington*, 243 U.S. 219 (1916). Each of these cases necessarily involved the question of the constitutionality of those provisions which limited or precluded the "right" of an injured employee to recover common law "damages". The reasoning adopted therein necessarily rejected the very contentions now being made by the petitioners.

We quote from the opinion in the *New York Central Railroad Company* case:

> "The adverse considerations urged or suggested in this case and in kindred cases submitted at the same time are: * * *
>
> (b) that the employee's rights are interfered with, in that he is prevented from having compensation for injuries arising from the employer's fault commensurate with the damages actually sustained, and is limited to the measure of compensation prescribed by the act * * *.
>
> In support of the legislation, it is said that the whole common-law doctrine of employer's liability for negligence, with its defenses of contributory

negligence, fellow-servant's negligence, and assumption of risk, is based upon fictions, and is inapplicable to modern conditions of employment; that in the highly organized and hazardous industries of the present day the causes of accident are often so obscure and complex that in a material proportion of cases it is impossible by any method correctly to ascertain the facts necessary to form an accurate judgment, and in a still larger proportion the expense and delay required for such ascertainment amount in effect to a defeat of justice; that under the present system the injured workman is left to bear the greater part of industrial accident loss, which because of his limited income he is unable to sustain, so that he and those dependent upon him are overcome by poverty and frequently become a burden upon public or private charity; and that litigation is unduly costly and tedious, encouraging corrupt practices and arousing antagonisms between employers and employees.

In considering the constitutional question, it is necessary to view the matter from the standpoint of the employee as well as from that of the employer. For, while plaintiff in error is an employer * * * *the exemption from further liability is an essential part of the scheme, so that the statute if invalid as against the employee is invalid as against the employer.*

* * * *No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged* for his benefit * * * *The common law bases the employer's liability for injuries to the employee upon the ground of negligence*; but negligence is merely the disregard of some duty imposed by law; and the *nature and extent of the duty may be modified by legislation*, with corresponding change in the test of negligence."

(Emphasis added)

The rationale of these three cases has been uniformly followed by this Court, by all Federal Courts and by all State Courts since that time.

In *Middleton v. Texas Power & Light Company*, 249 U.S. 152 (1918), this Court specifically rejected the assertion that workmen's compensation laws constitute a "deprivation of liberty and property without due process of law" by requiring employees to accept it and thus eliminating an employees' common law remedy. We quote from the opinion at page 163 thereof:

> "The definition of negligence, contributory negligence, and assumption of risk, the effect to be given to them, the rule of respondeat superior, the *imposition of liability without fault*, and the *exemption from liability in spite of fault*—all these, as *rules of conduct*, are *subject to legislative modification*. And a plan imposing upon the employer responsibility for making compensation for disabling or fatal injuries irrespective of the question of fault, and *requiring the employee to assume all risk of damages over and above the statutory schedule*, when established as a reasonable substitute for the legal measure of duty and responsibility previously existing, *may be made compulsory upon employees as well as employers.*" (Emphasis added)

Other cases decided by this Court upholding the constitutionality of state workmen's compensation laws, including the "exclusive remedy" provisions thereof, include *Arizona Employers' Liability Cases*, 250 U.S. 400 (1919), *New York Central Railroad Co.* v. *Bianc*, 250 U.S. 596 (1919) and *Dahlstrom Metallic Door Co. v. Ind. Bd. of N.Y.*, 284 U.S. 594 (1931).

In *Crowell* v. *Benson*, 285 U.S. 22 (1932), this Court upheld the constitutionality of the Longshoremen's and

Harbor Workers' Compensation Act (33 U.S.C. §901, et seq.), rejecting claims that it violated the Due Process Clauses of either the Fifth or Fourteenth Amendments.

This Act by §905 provides that the "liability of an employer" thereunder "shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, or anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death," excepting only cases where the "employer fails to secure payment of compensation" as required by the Act.

This Act, by §933(i) also provides that the "right to compensation or benefits . . . shall be the *exclusive remedy* to an employee when he is injured. . . *by the negligence or wrong of any other person in the same employ.*" (Emphasis added)

United States v. *Demko*, 385 U.S. 149 (1966), held that the compensation system provided by federal statute covering federal prisoners injured in prison employment was the "exclusive remedy" for such injury. That workmen's compensation statutes "are practically always thought of as substitutes for, not supplements to, common-law tort actions" is recognized in the opinion of Mr. Justice Black at p. 151 of *Demko*.

Congress, by the adoption of the Occupational Safety and Health Act specifically provided that nothing in that Act "shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to any injury, diseases, or death of employees arising out of, or in the course of, employment," 29 U.S.C.

§653(b)(4).

The Ohio workmen's compensation laws do not preclude actions by an injured employee against a third party tortfeasor. *Trumbull Cliffs Furnace Co.* v. *Schachovsky*, 111 Ohio St. 791 (1924); *Ohio Public Service Co.* v. *Sharkey*, 117 Ohio St. 586 (1927); *Truscon Steel Co.* v. *Trumbull Cliffs Furnace Co.*, 120 Ohio St. 394 (1929). An employer has no right of participation or subrogation in any recovery by his employee against a third party. Under the Ohio "collateral source rule" evidence of payment of compensation or medical expenses under workmen's compensation laws is not even admissible in the employee's suit against the third party tortfeasor. *McDowell* v. *Rockey*, 32 Ohio App. 26 (1929); *Levy* v. *Coon*, 11 Ohio App. 2d 200 (1964); *Pryor* v. *Webber*, 23 Ohio St. 2d 104 (1970). It is upon this basis that these cases are still pending in the trial court with respect to petitioners' claims for damages against the manufacturers and distributors of MBK and MEK.

The claims made by the petitioners herein constitute a frontal attack on the constitutionality of all of the workmen's compensation acts of the states and of the federal government. It is predicated on the bald assertion that the courts are the *only* "adequate forum" where petitioners could be "fairly compensated," and that the denial of petitioners' "rights of access" to the courts "is repugnant" to the Fifth and Fourteenth Amendments. This concept, if accepted, would require the overruling of all of this Court's opinions relating to the validity of workmen's compensation acts over the past sixty years, and would require the invalidation of every workmen's compensation act now in force and effect in the various states and in the federal government.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

OF COUNSEL:

EDGAR A. STRAUSE
VORYS, SATER, SEYMOUR AND PEASE
52 East Gay Street
Columbus, Ohio 43215

WALTER W. KOCHER
HARVEY A. ROSENZWEIG
180 East Broad Street
Columbus, Ohio 43215

Respectfully submitted,

ROBERT E. LEACH
52 East Gay Street
Columbus, Ohio 43215

Attorney for Respondents,
BORDEN, INC.,
EDWARD L. MAHONEY AND DEWEY BENNETT

APPENDIX A-1

COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

Case No. 74CV-09-3265

CHARLES E. ALLEN, et al.,
Plaintiffs,

vs.

EASTMAN KODAK COMPANY, et al.,
Defendants.

DECISION

Rendered this 23rd day of June, 1975.

MARTIN, J.

The motion of Plaintiffs filed April 17, 1975, for an extension of time is OVERRULED.

The motion of Plaintiffs filed March 28, 1975, for permission to file an amended complaint setting forth additional Defendants is SUSTAINED.

The motion of Defendant William T. Paul, M.D., for Summary Judgment filed February 26, 1975 is SUSTAINED on the grounds set forth in the first paragraph of the motion.

The motion of Borden, Inc., for Summary Judgment filed February 19, 1975, is SUSTAINED on the grounds set forth in the first paragraph of the motion. Upon the same grounds and for the further reason that a "named Defendant" Columbus Coated Fabrics Division of Borden Chemical Co. is shown to be a "Division" of Defendant Borden, Inc., the granting of the Motion for Summary Judgment should include the "named Defendant".

The motion of Defendants Edward L. Mahoney and Dewey Bennett for Summary Judgment filed February 19, 1975, is SUSTAINED on the grounds set forth in the first paragraph of the motion.

An Entry shall be prepared reflecting this Decision.

/s/ PAUL W. MARTIN, *Judge*

APPENDIX A-2

IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO

No. 74CV-09-3265

CHARLES E. ALLEN, et al.,
Plaintiffs,

vs.

EASTMAN KODAK COMPANY, et al.,
Defendants.

JUDGMENT ENTRY

Pursuant to the provisions of Civil Rule 56, the following matters have come on for hearing before the Court:

1) The Motion of defendant, Borden, Inc., filed February 19, 1975 for Summary Judgment in its favor and dismissing it as a party-defendant;

2) The Joint Motion of defendants, Edward L. Mahoney and Dewey Bennett, filed February 19, 1975 for Summary Judgment in their favor and dismissing them as parties-defendant;

3) The Motion of defendant, William T. Paul, M.D., filed February 26, 1975 for Summary Judgment in his favor and dismissing him as a party-defendant.

The Motion of plaintiffs filed April 17, 1975 for a further extension of time to respond to such Motions for Summary Judgment is overruled.

Upon consideration of the merits of the foregoing Motions for Summary Judgment, the Court finds from the pleadings and affidavits attached to such Motions, that there is no genuine issue as to any material fact with respect to compliance by Borden, Inc. with the

provisions and requirements of the Ohio Workmen's Compensation Act (R.C. 4123.01 to 4123.97, inclusive); as to the fact that the personal injuries with respect to which plaintiffs seek to recover damages were received in the course of and arising out of their employment with Borden, Inc. at its Columbus, Ohio manufacturing facility [designated "Columbus Coated Fabrics"], and thus are compensable under the provisions of the Ohio Workmen's Compensation Act; and as to the fact that defendants, Edward L. Mahoney, Dewey Bennett and William T. Paul, M.D., at all times involved herein, were also employees of Borden, Inc.

The Court finds, therefore, as a matter of law that pursuant to the provisions of R.C. 4123.74 and of Section 35, Article II of the Constitution of Ohio, Borden, Inc. [and "Columbus Coated Fabrics"], as the employer of each of the plaintiffs herein, cannot be held liable to respond in damages for the injuries alleged herein; that this Court is not empowered by law to provide redress by an employer for a work-related injury or disease of a person employed by an employer who has complied with the Ohio Workmen's Compensation Act; and thus this Court lacks jurisdiction to entertain this action against defendant Borden, Inc. [or against "Columbus Coated Fabrics"].

The Court further finds, as a matter of law, that pursuant to the provisions of R.C. 4123.741 defendants, Edward L. Mahoney, Dewey Bennett and William T. Paul, M.D., as employees of plaintiffs' employer, cannot be held to be liable to respond in damages for such injuries to plaintiffs.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Motions of defendants, Borden, Inc., Edward L. Mahoney, Dewey Bennett and

William T. Paul, M.D., for Summary Judgment in their favor are sustained; and summary judgment is hereby entered dismissing Borden, Inc. [and "Columbus Coated Fabrics"], Edward L. Mahoney, Dewey Bennett and William T. Paul, M.D. as parties-defendants with respect to the claims made against them by the plaintiffs, with prejudice to future action against them by plaintiffs.

The summary judgment entered herein constitutes a final judgment, the Court, pursuant to Civil Rule 54(B), expressly finding and determining that said summary judgment involves questions of law applicable only to the issues joined between plaintiffs and these defendants; that the determination thereof will have no effect upon the issues joined herein with respect to other parties; and that there is no just reason for delay in granting final judgment at this time in favor of defendants, Borden, Inc. [including "Columbus Coated Fabrics"], Edward L. Mahoney, Dewey Bennett and William T. Paul, M.D.

/s/ PAUL W. MARTIN, *Judge*

APPENDIX B

**IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO**

Case No. 74CV-09-3265

CHARLES E. ALLEN, et al.
Plaintiffs

vs.

EASTMAN KODAK COMPANY, et al.
Defendants.

SECOND AMENDED COMPLAINT

First Cause of Action

1. At all times relevant, Defendants enumerated above engaged in the following activities and had the following places of business: Defendant Eastman Kodak Company is a New Jersey corporation with its principal place of business in New York and licensed to do business in Ohio. Defendant Eastman Chemical Products, Inc. is a New York corporation with its principal place of business in Tennessee and licensed to do business in Ohio. Defendants Eastman Kodak Company and Eastman Chemical Products, Inc. manufactured and placed on the market certain chemicals including, but not limited to, chemicals demoninated MBK and MEK. Defendants Arco Chemical, Shell Chemical Company, Celanese Chemical Company, Exxon Chemical Company, Union Carbide, and Texaco, Inc. manufactured and placed on the market certain chemicals including, but not limited to, chemicals denominated MEK: Defendant Ashland Chemical Company packaged and distributed certain chemicals including, but not limited to, chemicals denominated MBK and MEK for all of the above-enumerated Defendants to Columbus Coated Fabrics, a Division of Borden Chemical Co., which is a Division of Borden, Inc., engaged in the business of manufacturing and selling vinyl products. Defendant Edward L. Mahoney, at all times relevant, was President of Columbus Coated Fabrics. Defendant Dewey Bennett, at all times relevant, was Safety Director of Columbus Coated Fabrics. Defendant William T. Paul, M.D. was, at all times relevant, employed by Borden, Inc. and Columbus Coated Fabrics in his professional capacity.

2. Plaintiffs, at all times material, were employees of the Defendants, Borden, Inc. and Columbus Coated Fabrics. Each of the said Plaintiffs suffer from various stages of peripheral neuropathy.

3. Prior to March 1973, the named Defendant manufacturers and distributors manufactured and/or distributed on the market place certain chemicals including, but not limited to, chemicals denominated MBK and MEK.

4. Prior to March 1973, the above-named Defendant manufacturers and distributors contracted with Defendants Borden, Inc. and Columbus Coated Fabrics for the purchase of MBK and MEK to be used in the manufacturing process at the Columbus Coated Fabrics facility in Columbus, Ohio.

5. Prior and subsequent to March 1973, Plaintiffs were exposed to the fumes and otherwise noxious characteristics of MBK and MEK within the scope of their employment. As a direct result of the negligence of the Defendants Eastman Kodak Company and Eastman Chemical Products, Inc. in manufacturing

and distributing MBK; and Ashland Chemical Company in distributing MBK; Defendants Arco Chemical, Shell Chemical Comany, Celanese Chemical Company, Exxon Chemical Company, Union Carbide, and Texaco, Inc. in the manufacture of MEK; and Arco Chemical, Shell Chemical Company, Celanese Chemical Company, Exxon Chemical Company, Union Carbide, Texaco, Inc., Ashland Chemical Co., and Tag Chemical in the distribution of MEK and in failing to adequately warn the users of the dangerous nature of said chemicals, on or about March 1973 and at various times thereafter, Plaintiffs have been injured as hereinafter set forth.

Second Cause of Action

6. Plaintiffs reallege paragraphs 1 through 4 of the First Cause of Action as if fully rewritten herein.

7. Defendants Eastman Kodak Company and Eastman Chemical Products, Inc. in manufacturing, packaging, and selling MBK; Defendants Arco Chemical, Shell Chemical Company, Celanese Chemical Company, Exxon Chemical Company, Union Carbide, Texaco, Inc. in manufacturing and selling MEK; Defendant Ashland Chemical in packaging and distributing both MBK and MEK; and Defendant Tag Chemical in packaging and distributing MEK to Borden, Inc. and to Columbus Coated Fabrics (hereinafter CCF), all knew or should have known that said chemicals were to be used in the manufacturing process at CCF and expressly warranted that said chemicals were suitable and reasonably fit or reasonably safe for the purpose for which they were intended to be used.

8. Plaintiffs relied on the skill and judgment of the above-named Defendants and upon said Defendants'

warranties in working with and in the presence of such chemicals.

9. These said express warranties were not true and the said chemicals were not suitable and reasonably fit or reasonably safe to be used for the purpose for which they were intended to be used.

10. As a direct result of the breach of express warranties by said Defendants, Plaintiffs were injured as hereinafter set forth.

Third Cause of Action

11. Plaintiffs reallege paragraphs 1 through 4 of the First Cause of Action as if fully rewritten herein.

12. Defendants Eastman Kodak Company and Eastman Chemical Products, Inc., in the manufacturing, packaging and selling of MBK; Defendants Arco Chemical, Shell Chemical Company, Celanese Chemical Company, Exxon Chemical Company, Union Carbide, and Texaco, Inc. in the manufacture, packaging, and selling of MEK; Defendant Ashland Chemical Co. in the packaging and distributing of MEK and MBK; and Defendant Tag Chemical in the packaging and distributing of MEK to Borden, Inc. and CCF, all knew or should have known that said chemicals were to be used in a manufacturing process at CCF and impliedly warranted to Plaintiffs that said chemicals were of a good and merchantable quality and were reasonably safe and fit for the purpose for which they were intended to be used.

13. Plaintiffs relied upon the skill and judgment of the Defendants and upon said Defendants' Implied warranties in working with and in the presence of said chemicals.

14. At the time of the sale of said chemicals to

Plaintiffs' employers, Borden, Inc. and CCF, the implied warranties were not true and the said chemicals were not of a merchantable quality and were not suitable and reasonably fit or reasonably safe to be used for the purpose for which they were intended to be used.

15. As a direct result of the breach of the implied warranties, Plaintiffs were injured as hereinafter set forth.

Fourth Cause of Action

16. Plaintiffs reallege paragraphs 1 through 4 of the First Cause of Action as if fully rewritten herein.

17. Defendants Eastman Kodak and Eastman Chemical, in manufacturing, packaging, and selling MBK; Defendants Arco, Shell, Celanese, Exxon, Union Carbide and Texaco, in manufacturing, packaging, and selling MEK; Defendant Ashland, in packaging and distributing MBK and MEK; and Defendant Tag, in packaging and distributing MEK to Borden, Inc. and Columbus Coated Fabrics, all placed upon the market, chemicals which were unsafe and unreasonably dangerous for their intended use.

18. The above enumerated Defendants, in manufacturing, selling, packaging, and distributing said chemicals, knew that the chemicals would be used without inspection and represented that the said chemicals would safely perform the function they were intended to do.

19. Plaintiffs used and were in contact with said chemicals in a manner which was reasonably foreseeable by the said Defendants.

20. Plaintiffs, while the said chemicals were being used for the purposes and in the manner which they

were intended to be used by said manufacturing, selling, packaging and distributing Defendants, were injured as a direct result of the defective and unreasonably dangerous nature of the said chemicals.

21. As a result of the manufacturing, packaging, selling, and distributing by Defendants and Defendant's aforementioned negligence and failure to warn, as a result of the breach of their express and implied warranties, and as a result of the defective nature of the aforementioned chemicals, the Plaintiffs, on or about March, 1973, and at various times thereafter, have been rendered sick and poisoned, causing them pain, discomfort and emotional distress which will continue for the indefinite future, and causing permanent injury.

22. Plaintiffs have incurred medical and hospital expenses, and they expect to incur further such expenses in the future.

23. Plaintiffs have been unable to obtain life insurance and have been forced to absent themselves from work, resulting in loss of earnings, and they expect to lose further such earnings in the future.

Fifth Cause of Action

24. Plaintiffs reallege paragraphs 1 and 2 of the First Cause of Action as if fully rewritten here.

25. Defendants Borden, Inc. and CCF, through their duly authorized agents and employees and through the Defendants Edward L. Mahoney and Dewey Bennett, and Defendants Edward L. Mahoney and Dewey Bennett had knowledge and notice that dangerous health conditions and serious health hazards existed in the manufacturing facility of CCF and in CCF's warehouse in Worthington, Ohio, prior to August, 1973.

26. Defendants Borden, Inc., CCF, Edward L. Mahoney and Dewey Bennett had a duty to correct such conditions and to warn Plaintiffs of these conditions and health hazards and a duty to report said conditions and hazards to various State and Federal agencies by law, all to protect the health and welfare of the Plaintiffs.

27. Notwithstanding the knowledge of said Defendants that such conditions and hazards existed, the Defendants, Borden, Inc., CCF, Edward L. Mahoney and Dewey Bennett failed to correct said conditions, failed to warn Plaintiffs of the dangers and conditions that existed and failed to report said conditions to the various State and Federal agencies to which they were required to report by law, such acts being of omission and commission and constituting negligence.

28. Such failure on the part of the said Defendants was intentional, malicious and in willful and wanton disregard of the health of the Plaintiffs. As a direct and proximate result of this malicious and willful failure to correct, warn and report the health hazards and dangerous conditions that existed, the Plaintiffs have been injured as hereinafter set forth.

Sixth Cause of Action

29. Plaintiffs reallege paragraphs 1 and 2 of the First Cause of Action and paragraphs 25 through 28 of the Fifth Cause of Action as if fully rewritten herein.

30. On or about August, 1973, and subsequent to that time, the Defendants Borden, Inc. and CCF, by and through their duly authorized agents and employees and through Edward L. Mahoney and Dewey Bennett, disclosed to various State and Federal

agencies to whom they were required to report that various conditions and health hazards existed at the CCF manufacturing facility and at the CCF Worthington warehouse.

31. Prior to and subsequent to said disclosures and as a result of the various State and Federal agencies' investigations and inspections of the CCF facilities, orders were issued by these agencies to Defendants Borden, Inc., CCF, Edward L. Mahoney and Dewey Bennett to correct the dangerous health conditions and hazards that existed at the CCF facilities in order to protect the health and safety of the Plaintiffs and which orders the said Defendants were obligated by law to obey.

32. Defendants Borden, Inc., CCF, Edward L. Mahoney and Dewey Bennett did not implement or obey these orders, in direct violation of State and Federal law and in violation of their duty to protect the health and safety of the Plaintiffs, such acts being of omission and commission and constituting negligence.

33. Said omissions and commissions by the Defendants were intentional, malicious and in willful and wanton disregard of the health of the Plaintiffs. As a direct and proximate result of said Defendants' willful negligence, the Plaintiffs have been injured as hereinafter set forth.

Seventh Cause of Action

34. Plaintiffs reallege paragraphs 1 and 2 of the First Cause of Action as if fully rewritten herein.

35. Prior to August, 1973, Defendants Borden, Inc. and CCF, through their duly authorized agents and employees, and Defendant William T. Paul, M.D.,

had knowledge and notice that certain occupational diseases were being contracted at the CCF manufacturing and warehouse facilities.

36. Defendants had a duty to warn the Plaintiffs concerning such disease and to report such occupational diseases to, while not limited to, State officials pursuant to Ohio Revised Code 3701.25, all to protect the health and safety of the Plaintiffs.

37. Notwithstanding the knowledge of said Defendants that certain occupational diseases were being contracted, the Defendants, Borden, Inc., CCF and William T. Paul, M.D., failed to warn the Plaintiffs and failed to report the diseases as required by law, such acts being of omission and commission and constituting negligence.

38. Said omissions and commissions by the Defendants were intentional, malicious, and in willful and wanton disregard of their duty to protect the health of the Plaintiffs.

39. As a direct and proximate result of the Defendants' Borden, Inc., CCF, Edward L. Mahoney, Dewey Bennett, and William T. Paul, M.D. intentional, malicious and willful and wanton failure to correct, warn and report the health hazards, dangerous conditions and occupational diseases that existed at CCF, and their intentional, malicious, and willful and wanton failure to implement and obey the various orders given them by State and Federal agencies to protect the health and safety of the Plaintiffs, the Plaintiffs, on or about March, 1973, and at various times thereafter have been rendered sick and poisoned, causing them pain, discomfort and emotional distress which will continue for the indefinite future and causing permanent injury.

40. Plaintiffs have incurred medical and hospital expenses and expect to incur further expenses in the future.

41. Plaintiffs have been unable to obtain life insurance and have been forced to absent themselves from work, resulting in loss of earnings, and they expect to lose further such earnings in the future.

WHEREFORE, Plaintiffs each individually demand judgment against the Defendants, jointly and severally, in the amount of Five Hundred Thousand Dollars ($500,000.00) as compensatory and punitive damages, together with attorneys fees and costs.

/s/ PHILIP R. BRADLEY
Attorney for Plaintiffs

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-800

CHARLES E. ALLEN
and
JOHN W. HORN, et al.,
Petitioners,

vs.

COLUMBUS COATED FABRICS,
A DIVISION OF BORDEN CHEMICAL CO.;
EASTMAN KODAK COMPANY, et al.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

MEMORANDUM OF RESPONDENT WILLIAM T. PAUL, M.D. OPPOSING PETITION FOR WRIT OF CERTIORARI

EARL F. MORRIS
WRIGHT, HARLOR, MORRIS & ARNOLD
37 W. Broad Street
Columbus, Ohio 43215
Attorney for Respondent
WILLIAM T. PAUL, M.D.

PHILIP R. BRADLEY
BRADLEY & FARRIS
1260 E. Broad Street
Columbus, Ohio 43203
Attorney for Petitioners

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43215

ROBERT E. LEACH
VORYS, SATER, SEYMOUR & PEASE
52 E. Gay Street
Columbus, Ohio 43215
Attorney for Respondents
BORDEN, INC.,
EDWARD L. MAHONEY
AND DEWEY BENNETT

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MEMORANDUM OF RESPONDENT WILLIAM T. PAUL, M.D. OPPOSING PETITION FOR WRIT OF CERTIORARI

Summary judgment was entered in the Court of Common Pleas for respondent William T. Paul, M.D., and affirmed by the Court of Appeals, and motions to certify were denied and the appeals dismissed as to him by the Supreme Court of Ohio, just as with respect to respondents Borden, Inc., Edward L. Mahoney and Dewey Bennett. Dr. Paul stood in the same position in each of these courts as did respondents Edward L. Mahoney and Dewey Bennett, and, accordingly, stands in the same position as they do as to the Petition for Writ of Certiorari in this Court.

The position of respondents Borden, Inc., Edward L. Mahoney and Dewey Bennett in opposition to the petition has been fully briefed by their counsel, and it would serve no useful purpose for us to repeat the argument there made. Accordingly, we incorporate by reference the brief filed on behalf of respondents Borden, Inc., Edward L. Mahoney and Dewey Bennett, including the comment as to the unfounded nature of the statements at page 5 of the petition as they apply to Dr. Paul, and rely upon that brief as our position on behalf of Dr. Paul opposing the petition.

We, accordingly, respectfully join with respondents Borden, Inc., Edward L. Mahoney and Dewey Bennett in submitting that the Petition for Writ of Certiorari should be denied.

EARL F. MORRIS
WRIGHT, HARLOR, MORRIS & ARNOLD
37 W. Broad Street
Columbus, Ohio 43215
Attorney for Respondent
WILLIAM T. PAUL, M.D.